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Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF *AMICI CURIAE* STATES OF NORTH DAKOTA, ARKANSAS, CALIFORNIA, LOUISIANA, MARYLAND, MINNESOTA, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, OKLAHOMA, OREGON, RHODE ISLAND, UTAH, AND WASHINGTON IN SUPPORT OF PETITIONER

HEIDI HEITKAMP
Attorney General of North Dakota

DOUGLAS A. BAHR
Solicitor General

BETH ANGUS BAUMSTARK
Assistant Attorney General
Counsel of Record

600 East Boulevard Avenue
Bismarck, North Dakota 58505-0040
(701) 328-2210
Counsel for Amici States

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1695

Mark Pryor
Attorney General of
Arkansas
200 Tower Building
323 Center Street
Little Rock, AR
72201-2610

Bill Lockyer
Attorney General of
California
1300 I Street
Sacramento, CA 95814

Richard P. Ieyoub
Attorney General of
Louisiana
PO Box 94005
Baton Rouge, LA
70804-9095

J. Joseph Curran, Jr.
Attorney General of
Maryland
200 St. Paul Place
Baltimore, MD 21202

Mike Hatch
Attorney General of
Minnesota
Suite 1100
445 Minnesota Street
St. Paul, MN 55101-2128

Jeremiah W. (Jay) Nixon
Attorney General of
Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

Philip T. McLaughlin
Attorney General of
New Hampshire
State House Annex
25 Capitol Street
Concord, NH 03301-6397

Patricia A. Madrid
Attorney General of
New Mexico
PO Drawer 1508
Sante Fe, NM 87504-1508

W.A. Drew Edmondson
Attorney General of
Oklahoma
2300 N. Lincoln Boulevard,
Suite 112
Oklahoma City, OK
73105-4894

Hardy Myers
Attorney General of
Oregon
1162 Court Street NE
Salem, OR 97310-0506

Sheldon Whitehouse
Attorney General of
Rhode Island
150 South Main Street
Providence, RI 02903

Jan Graham
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114

Christine O. Gregoire
Attorney General of
Washington
1125 Washington Street
PO Box 40100
Olympia, WA 98504-0100

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INTRODUCTION

In 1996 Massachusetts enacted a law limiting the authority of state agencies to purchase goods and services from persons who do business with Burma. Subject to certain exceptions, the Massachusetts Burma Law effectively requires Massachusetts' state agencies to increase by 10 percent the price of offers to sell goods and services to the Commonwealth submitted by companies that do business with Burma. In the months following enactment of the Massachusetts Burma Law, the United States imposed economic sanctions on Burma. The First Circuit Court of Appeals struck down the Massachusetts Burma Law.

STATEMENT OF INTEREST OF *AMICI* STATES

The 14 *Amici* States submit this brief in support of Massachusetts' petition for a writ of certiorari of the First Circuit's decision.

The *Amici* States have a strong interest in ensuring that the decision of the lower court, which unduly intrudes upon the States' sovereignty, is reviewed and corrected by this Court. The Massachusetts Burma Law is not unique. It is similar to many state and local laws concerning Northern Ireland, Cuba, Switzerland, and Nigeria. The lower court's decision calls into question these and other laws and ordinances – laws and ordinances that legitimately exercise citizens' sovereign right to decide how to spend public money and to express their desire to disassociate themselves from actions or programs they deem improper or detestable.

The First Circuit's decision has an immediate and significant impact on States acting as market participants. The decision of the First Circuit infringes on the States' residuary and inviolable sovereignty retained under the Tenth Amendment by interfering with the States' ability to independently make decisions regarding government procurement, historically an area of exclusive state control. This sweeping intrusion into areas of traditional state authority interferes with the States' freedom to determine with whom and under what terms they will conduct business. The First Circuit's unprecedented decision precludes the States from properly acting as guardians of the public fisc and fully representing their citizens in decisions grounded in social conscience and morality.

SUMMARY OF ARGUMENT

Whether the market participant exception applies to the Foreign Commerce Clause and the federal government's foreign affairs power is an important question of federal law which should be addressed by this Court in light of its impact on the States. By refusing to apply the market participant exception to the Foreign Commerce Clause and the federal government's foreign affairs power, the First Circuit's decision severely limits the application of the market participant doctrine.

The Tenth Amendment to the United States Constitution reserves to the States fundamental areas of state sovereignty which are to be left to the sole control of the States. Other areas of strong local concern which traditionally have been areas of local control, at times, may be

limited by congressional action, but only when the federal statutes apply equally to all persons and not just to the States. State government procurement is historically an area of local control. The federal government has recognized this by its exclusion of state procurement from the international procurement agreements the United States has entered, unless the individual States decide to bind themselves. The First Circuit's decision, which refused to view state procurement as entitled to considerations of state sovereignty, runs contrary to prior decisions of this Court.

In *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298 (1994), this Court clarified the preemptive effect of the federal government's foreign affairs power and the Foreign Commerce Clause on state laws. The Court held that it was the role of Congress, not the courts, to determine whether state action interfered with the federal government's foreign affairs power. To preempt a state law, after *Barclays*, specific indications of congressional intent must be shown. The decision of the First Circuit disregards the clear direction of this Court in *Barclays* and instead applies a "strong presumption" of congressional intent to preempt when a state law may affect foreign affairs.

The First Circuit's decision also conflicts with this Court's holding that preemption does not apply to the States' actions as market participants.

Further, a conflict exists between the First Circuit's decision in this case and the Third Circuit's decision in *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991), on the level of

congressional intent required to preempt a State's regulation of government procurement, whether Congress has tacitly acknowledged and permitted selective purchasing laws, and whether the market participant exception applies to the Foreign Commerce Clause.

ARGUMENT

I. THIS COURT SHOULD DECIDE THE IMPORTANT ISSUE OF THE APPLICATION OF THE MARKET PARTICIPANT EXCEPTION TO THE FOREIGN COMMERCE CLAUSE AND THE FEDERAL GOVERNMENT'S FOREIGN AFFAIRS POWER.

The decision of the First Circuit severely undermines the protection given the States by the market participant exception to the Commerce Clause. Since 1903, this Court has recognized that a State acting in a proprietary role is not subject to the same constraints as when acting as a regulator. *Atkin v. Kansas*, 191 U.S. 207 (1903).

> [I]t belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.

Id. at 222-23. Specifically discussing government procurement, this Court has said: "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those

with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940).

The impact of the Commerce Clause on the States when acting in their proprietary role was first addressed by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In *Hughes*, this Court held that the Commerce Clause does not impede the States when they have entered the market as a purchaser. *Id.* at 808-09. Since that decision, the Court has consistently held that the Commerce Clause is not implicated by a State's actions as a market participant. For example, in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the Court stated: "The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.* at 436-37.

The Court in *Reeves* pointed out several policy considerations underlying the market participant doctrine: state sovereignty, the unquestioned freedom afforded private businesses to freely determine with whom they will conduct business, and the "role of each State as guardian and trustee for its people." *Id.* at 438 (quoting *Heim v. McCall*, 239 U.S. 175, 191 (1915)).

The policy considerations underlying the market participant doctrine apply equally to the federal government's foreign affairs power and the Foreign Commerce Clause. Certainly a State's right to exercise its own sovereignty in deciding with whom to do business is as strong internationally as it is nationally. The right of a business

to limit its dealings to companies of its choice is as strong when the business partners are foreign as when they are domestic. The role of the State as "guardian and trustee for its people" is as strong when the State's market participation affects foreign markets as when it affects interstate commerce.

This Court has never directly addressed the application of the Foreign Commerce Clause to the States when they are acting as market participants. As the Court said in *Reeves*: "We have no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause or the constitutionality of 'Buy American' legislation." *Reeves*, 447 U.S. at 437 n.9.

The role of the States as market participants is one of great importance to the States. The First Circuit's decision severely undermines the States' sovereignty, their freedom to determine with whom and under what terms they will conduct business, and their ability to act as guardian and trustee for their citizens. Whether the Foreign Commerce Clause constrains the States when acting as market participants is an important question of federal law that has a broad impact on the States' autonomy. Because this is an important question of federal law which this Court should decide, the *Amici* States urge the Court to grant the petition for a writ of certiorari.

II. THE FIRST CIRCUIT'S DECISION UNDERMINES THE STATES' RIGHT OF SOVEREIGNTY IN THE AREA OF GOVERNMENT PROCUREMENT.

The First Circuit's decision in this case ignores the basic principles of state sovereignty previously identified

by this Court. In *Printz v. United States*, 521 U.S. 898 (1997), this Court reviewed the history of the Tenth Amendment of the Constitution of the United States and the manner in which it should be applied. In reviewing the "residuary and inviolable sovereignty" which the States retained under the Tenth Amendment, this Court pointed out that the Constitution contemplated "that a State's government will represent and remain accountable to its own citizens." *Id.* at 920. A State's decision on governmental purchasing is an area which requires a state government to be accountable to its citizens. Likewise, a State in enacting a selective purchasing law governing with whom the government may contract or under what conditions it may contract represents the State's citizens and acts as a guardian of the public fisc.

Under its Tenth Amendment analysis, the Court in *Printz* stated: "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Id.* at 928. This is consistent with the Court's holding in *Reeves* that the basis for the market participant doctrine lies in state sovereignty. *Reeves*, 447 U.S. at 438. The Court in *Printz* quoted from its opinion in *New York v. United States*, 505 U.S. 144, 166 (1992) stating that the allocation of power contained in the Commerce Clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Printz*, 521 U.S. at 924. The corollary of this is that Congress is not free to regulate the States acting in their proprietary roles in any way that private businesses are not regulated. The holdings in *Printz* and *New York*, taken together, make suspect

under the Tenth Amendment any act of Congress which applies only to the States rather than to the people as a whole.

The First Circuit's decision that Massachusetts' actions regarding its governmental purchasing are preempted by the Federal Burma Law, the Foreign Commerce Clause and the federal government's foreign affairs power disregards the sovereignty principles laid out in *Printz*. Because Congress has not restricted private businesses in making procurement decisions, in determining with whom they will contract, or in making such decisions on grounds of social conscience or morality, Congress may not so limit the States when acting as market participants.

Government procurement historically has been an area of exclusive state control. The spending boycotts of the colonies began a long history of governments' using their purchasing power as a means of expressing their strongly held moral and political beliefs.

The federal government has recognized that procurement is an area of state sovereignty. While the United States committed itself to the Agreement on Government Procurement, attached as Annex 4 of the Agreement Establishing the World Trade Organization (WTO Agreement), the United States did not attempt to bind the States. Rather, the federal government left to each State the right to determine whether it would commit itself to the provisions of the procurement agreement. Similarly the 1979 Agreement of Government Procurement did not apply to the States. The federal government's actions thus recognized the importance of leaving decisions regarding

state and local government procurement, even when they may affect foreign commerce, to the States.

III. THE FIRST CIRCUIT'S HOLDINGS ARE INCONSISTENT WITH THIS COURT'S DECISIONS ON THE IMPORTANT FEDERAL QUESTION OF PREEMPTION OF STATE LAWS WHICH MAY AFFECT FOREIGN AFFAIRS.

In preemption analysis, "[t]he purpose of Congress is the ultimate touchstone." *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963). "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Building and Const. Trades Council of Metro. Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.* (hereafter *Boston Harbor*), 507 U.S. 218, 224 (1993) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

Consistent with these principles, this Court in *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298 (1994), held that it was the province of Congress – not the courts – to determine whether state action was preempted under the federal foreign affairs power or the Foreign Commerce Clause. In determining whether a state statute violated the federal government's foreign affairs power or the Foreign Commerce Clause, the Court looked for "specific indications of congressional intent" to preempt California's law. *Id.* at 324. The lack of any such indications led the Court to uphold California's law.

Rather than follow the Court's decision in *Barclays*, the First Circuit applied a "strong presumption" that

Congress intends to preempt a field when it legislates in an area of foreign relations. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 75 (1st Cir. 1999). Besides conflicting with the proper analysis for preemption in the area of foreign affairs laid down by the Court in *Barclays*, application of such a presumption in this case ignores the Court's holdings in a long line of cases which recognize the Commerce Clause market participant exception discussed in Argument I and the States' Tenth Amendment sovereignty discussed in Argument II.

In an attempt to determine congressional intent to preempt under the Foreign Commerce Clause, the Court in *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986), reviewed the bilateral agreements the United States had with other countries. The Court found that the bilateral agreements prohibited only federal charges and did not preclude state taxation. Based on this, the Court held: "By negative implication arising out of [these international agreements], the United States has at least acquiesced in state taxation of fuel used by foreign carriers in international travel." *Id.* at 12. Indeed, the Court continued, stating "the Federal Government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority. In our view, the facts presented in this case show that the Federal Government has affirmatively decided to permit the States to impose these sales taxes on aviation fuel." *Id.*

In accord with the Court's holding in *Wardair*, the Court in *Barclays* enunciated the principle that congressional silence on preemption, when Congress is aware of state statutes in the area in which it is legislating, constitutes Congress' implicit permission for the States to take

the action they have. *Barclays*, 512 U.S. at 325-26. Further, the Court in *Barclays*, consistent with the Court in *Wardair*, considered the treaties which the United States had entered and whether they showed an intent to govern the issue in question.

The First Circuit's decision in this case, by ignoring the implication of the federal government's exclusion of the States' procurement under the international procurement agreements, conflicts with the analysis set forth in both *Barclays* and *Wardair*. *See* Argument II above.

This Court has held that preemption doctrines do not apply to state laws governing the States' actions as market participants, but "apply only to state *regulation*." *Boston Harbor*, 507 U.S. at 227 (emphasis in the original). The First Circuit's decision conflicts with this Court's holding in *Boston Harbor* by not considering that preemption does not apply to state statutes that govern the State as a market participant.

Finally, by applying a presumption of intent to preempt, the First Circuit's decision conflicts with the established rule that preemption must be based on "clear and manifest" congressional intent where the area said to be preempted includes areas traditionally occupied by the States. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977)).

Because the First Circuit's decision conflicts with a number of relevant decisions of this Court on the important federal question of preemption of state laws, the *Amici* States urge the Court to grant Massachusetts' petition for a writ of certiorari.

IV. A CONFLICT EXISTS BETWEEN THE FIRST AND THIRD CIRCUITS ON THE PREEMPTION ANALYSIS TO APPLY TO LAWS REGULATING STATE PROCUREMENT AND ON WHETHER THE MARKET PARTICIPANT EXCEPTION APPLIES TO THE FOREIGN COMMERCE CLAUSE.

The First Circuit's decision in this case is in direct conflict with the Third Circuit's decision in *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991). The courts in both cases addressed challenges to a State's procurement law under the Foreign Commerce Clause, the federal government's foreign affairs power, and preemption under federal law. The conflicting analyses and holdings of the two Circuit Courts of Appeal in this area of highly significant importance to the States requires this Court to resolve the issues.

According to the First Circuit, the Tenth Amendment does not insulate the Massachusetts Burma Law from review because the federal government's foreign affairs power overrides States' actions, even in traditional areas of state concern. *National Foreign Trade Council*, 181 F.3d at 60-61. The Third Circuit relied on the policy enunciated in *Tafflin v. Levitt*, 493 U.S. 455 (1990), that federalism concerns raise a presumption that Congress ordinarily does not intend to displace existing state authority. *Trojan*, 916 F.2d at 906. The preemption analysis in the Third Circuit began with the recognition that a State's procurement policy is an area of traditional local control and thus is entitled to considerations of sovereignty. *Id.* at 910.

This difference in approach led the First Circuit to apply a strong presumption that any state law which

affects foreign affairs is preempted, while the Third Circuit held that a "clear and manifest" indication of congressional intent is required to preempt a state statute regulating state procurement. This direct conflict in the proper level of congressional intent needed to preempt a state procurement statute presents to the States a highly significant question of what actions States may take in regulating the entire area of the States' expenditures and investments.

The Third Circuit in *Trojan* reviewed the international procurement agreements which the United States had entered and found the federal government, by excluding state procurement from those agreements, had tacitly acknowledged and permitted selective purchasing laws. *Trojan*, 916 F.2d at 907-08. The First Circuit refused to consider the fact that the federal government had excluded state procurement from the international procurement agreements the United States entered.

While finding that Massachusetts' actions under the Massachusetts Burma Law went beyond acting as a market participant, the First Circuit's decision, nonetheless, strongly suggests that the market participant exception does not apply to the Foreign Commerce Clause. *National Foreign Trade Council*, 181 F.3d at 62-63, 65. The Third Circuit held in *Trojan* that the market participant exception to the Commerce Clause applied equally to both the domestic and foreign aspects of the Commerce Clause. *Trojan*, 916 F.2d at 910.

The conflict between the First and Third Circuits on the proper preemption analysis to apply to laws

governing state procurement, on Congress' tacit acknowledgment and acquiescence in selective purchasing laws, and on the application of the market participant exception to the Foreign Commerce Clause presents important issues for review by this Court.

CONCLUSION

For the foregoing reasons, the 14 *Amici* States respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

HEIDI HEITKAMP
Attorney General
State of North Dakota

DOUGLAS A. BAHR
Solicitor General

BETH ANGUS BAUMSTARK
Assistant Attorney General
Counsel of Record

600 East Boulevard Avenue
Bismarck, North Dakota
58505-0040
(701) 328-2210